

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

| | | |
|------------------------|---|--------------------|
| NEAL HOUSTON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | No. 1:06-CV-60 CAS |
| v. |) | |
| |) | |
| CHARLES DWYER, et al., |) | |
| |) | |
| Defendants. |) | |

ORDER

This matter is before the Court on plaintiff's appointed counsel John Garrabrant's motion to withdraw as plaintiff's attorney. For the following reasons, the Court will deny the motion without prejudice.

On August 17, 2007, the Court appointed John Garrabrant of the law firm Thomas, Birdsong & Mills, P.C. to serve as plaintiff's attorney. Plaintiff's suit alleges defendants violated his constitutional rights by denying him health care during his incarceration. Plaintiff brings this action against eleven defendants, including defendant Michael Bowersox, superintendent of the South Central Correctional Center located at Licking, Missouri.

In his motion to withdraw, Mr. Garrabrant states that he has been associated socially and professionally with defendant Bowersox for approximately 15 years. He states that he has represented defendant Bowersox on one occasion, although he does not specify the nature of the representation. Mr. Garrabrant also states that he "is in possession of information regarding Michael Bowersox which would not have been available but for the attorney/client relationship." (Mot. at ¶ 7). Without citing any rules of professional conduct, he states that his ability to represent plaintiff as

a court-appointed attorney is impeded by “the rules of professional conduct regarding confidentiality of client/attorney communication.” Id. at ¶ 9. Finally, he states that his representation of plaintiff gives rise to the “appearance of impropriety.” Id. at ¶ 10.

Local Rule 12.02 of the United States District Court for the Eastern District of Missouri adopts the Rules of Professional Conduct adopted by the Supreme Court of Missouri. See E.D. Mo. L.R. 12.02. The Supreme Court of Missouri adopted the Rules of Professional Conduct effective January 1, 1986. See Mo. Sup. Ct. R. 4. Based on the representations of Mr. Garrabrant, he personally represented defendant Bowersox as a former client of his firm. Therefore, his conflict will be governed by Missouri Rule 4-1.9(a).

Missouri Rule 4-1.9(a) codifies case law that prohibits a lawyer from representing a party with interests adverse to those of a former client who was represented in the same or substantially related matter. See ABA Annotated Model Rules of Prof'l Conduct 1.9 (5th ed. 2003). Missouri Rule 4-1.9(a) states:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Missouri Rule 4-1.9(a).

The Court has no information regarding the nature of Mr. Garrabrant's former representation of defendant Bowersox. The Court also has no information regarding the nature of any attorney/client communication between counsel and defendant Bowersox. It cannot, therefore, evaluate whether Mr. Garrabrant's former representation was “in the same or a substantially related matter” such that it would create a conflict of interest with Mr. Garrabrant's continued representation of plaintiff Houston. Nor can the Court evaluate whether any confidential communication was

exchanged related to this representation that would be used to the disadvantage of defendant Bowersox. See Missouri Rule 4-1.9(c).

Additionally, the Missouri Rules of Professional Conduct have not adopted the “appearance of impropriety” standard applied by the Model Code of Professional Responsibility, which was repealed effective January 1, 1986. See Mo. Sup. Ct. R. 4; see also Harker v. Commissioner of Internal Revenue, 82 F.3d 806, 808-09 (8th Cir. 1996). Counsel’s statement that his continued representation of plaintiff gives rise to the appearance of impropriety does not alone require disqualification.

Finally, the Court notes for counsel that his service as appointed counsel is for the benefit of both the Court and plaintiff. Counsel has served for nearly two months without raising any issue regarding a conflict of interest arising out of his former representation of defendant Bowersox. The Court is not inclined to grant a motion to withdraw based on a conflict of interest without citation to the applicable law and a recitation of specific facts establishing an insurmountable conflict of interest.

Accordingly,

IT IS HEREBY ORDERED plaintiff’s motion to withdraw is **DENIED without prejudice**.

[Doc. 83]

A handwritten signature in cursive script, reading "Charles A. Shaw", written in black ink.

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 16th day of October, 2007.